PETITION FOR A WRIT OF CERTIORARI

(4)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 340

JOHN O. MURRAY,

Petitioner,

vs.

BUSTER NED, A MINOR, LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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BUSTER NED, A MINOR, LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND; MOSES JOHNSON; STATE OF OKLAHOMA, EX REL., OKLAHOMA TAX COMMISSION; AND THE HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES AND ASSIGNS, IMMEDIATE AND REMOTE, OF WILLIE TOM, DECEASED, FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 927; AND FRANK NED, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 264; AND UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, John O. Murray, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on February 19, 1943, affirming the judgment rendered by the United States District Court for the Eastern District of Oklahoma.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 21-24) is reported in 135 Fed. (2d) 407. The District Court did not write an opinion. Its findings, conclusions and judgment appear at pages 11-17 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Tenth Circuit here sought to be reviewed was entered on February 19, 1943 (R. 24). A petition for rehearing was timely filed (R. 25) and it was denied on March 24, 1943 (R. 26). A timely petition for rehearing was thereafter filed with permission of the court (R. 28-30) and this was denied on June 12, 1943 (R. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether under the Act of January 27, 1933, c. 23, 47 Stat. 777, lands purchased by a citizen of Oklahoma who is a member of the Five Civilized Tribes with unrestricted funds and on an unrestricted form of deed, descends on his death to his full-blood Indian heirs subject to the same restrictions against alienation that apply to restricted allotted lands. (The material part of the Act of January 27, 1933, c. 23, 47 Stat. 777, is printed as Appendix A).

Statement.

The facts are undisputed and a correct and concise statement of the same is set forth in the opinion of the Circuit Court of Appeals (R. 21-24).

Specification of Error To Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the deed from the heir of Frank Ned

to John O. Murray required approval of the County Court of Marshall County, Oklahoma.

2. In affirming the judgment of the District Court and holding that upon the death of Frank Ned the lands descended to his full-blood heirs, subject to restrictions.

Reasons for Granting Writ.

1. The decision of the Circuit Court of Appeals will unquestionably cloud and affect the security of titles to lands in the State of Oklahoma and in other States. No one ever dreamed that the Act of January 27, 1933, c. 23, 47 Stat. 777, would restrict the full-blood Indian heirs of any and every property owner regardless how that owner acquired title and regardless whether that owner was white or Indian. If Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, operates as a reimposition of restrictions upon lands inherited by a full-blood Indian from an ancestor in whose hands the lands were free of restrictions, there would be no record evidence upon which citizens of Oklahoma acquiring title to such lands could determine whether the title was owned by ancestors of Indian blood and that the heirs are full-blood Indians and subject to Federal restriction.

Before the decision of the District Court in this case, it was well established that only restricted lands acquired by inheritance or devise by a full-blood Indian from an allottee or full-blood heir or devisee remained restricted.[1]

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[1] Parker vs Richard, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 915;
Harris vs Bell 254 U. S. 103, 41 S. Ct. 49, 655 L. Ed. 159;
Commissioner of Internal Revenue vs Owen, C. C. A. 10, 78 Fed. (2nd) 768, 769;
Holmes vs United States, C. C. A. 10, 53 Fed. (2nd) 960;
United States vs Mid-Continent Petroleum Company, C. C. A. 10, 67 Fed. (2nd) 37;
United States vs Easley, 33 Fed. Supp. 442.

Never before has any Court held that restrictions applied to land acquired by inheritance by full-blood Indians from a decedent, who, during his lifetime, acquired title by private purchase with unrestricted funds and on a unrestricted form of deed, free of restrictions.

The decision of the Circuit Court in this case is erroneously based upon the decisions of that Court in the case of *Whitchurch* vs. *Palmer,* C. C. A. 10, 92 Fed. (2nd) 249, and *McCurtain* vs. *Palmer,* C. C. A. 10, 121 Fed. (2nd) 1009.[2]

It is true that in this case the lands involved were originally allotted restricted lands and that upon the death of the allottee the lands descended to full-blood heirs subject to the qualified restriction contained in Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended by Act of April 12, 1926, 44 Stat. 239, and the Act of May 10, 1928, 45 Stat. 495. See cases cited under foot note (1) above. This qualified restriction upon the land herein involved was removed when all but one of the heirs conveyed their interests to Frank Ned, which deeds were approved by the proper County Court. Frank Ned, although a full-blood enrolled Indian became vested with the title to said land, free and clear of all restrictions, since he acquired the same by pur-

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[2] The Circuit Court in the case of Whitchurch vs Crawford 92 Fed. (2nd) 249, recognized that the lands therein involved were at all times restricted prior to and at the time of the inheritance by Watson Palmer, a full-blood. Watson Palmer took not directly but through remote inheritance from the deceased allottee. The Government contended and the Circuit Court so indicated that the land was restricted under the Act of April 12, 1926. The Government so contended that the lands were at all times restricted and even at the present time so contends.

Donald Horton Grisso vs United States, C. C. A. 10, No. 2708, pending.

In the case of McCurtain vs Palmer, C. C. A. 10, 121 Fed. (2nd) 1009, the court here again recognized that the lands therein involved were restricted on and prior to the inheritance by Watson Palmer, a full-blood. See United States vs Watashe, 102 Fed. (2nd) 428, 431. The Government has always contended that lands of the class involved in the McCurtain case remained restricted after April 26, 1931. The Government at the present time urges this contention in the case of United States vs Williams, C. C. A. 10, No. 2716, pending.

chase with funds that were entirely unrestricted and on an unrestricted form of deed. The fact that Frank Ned was a full-blood Indian places him in no different position than if he had been a non-Indian citizen. All members of the Five Civilized Tribes in Oklahoma have become full-fledged citizens of the State by virtue of the laws passed by Congress. *Oklahoma Tax Commissioner* vs. *United States,* 87 S. Ct. 1233, 1239. Therefore, members of the Five Civilized Tribes are clothed with the same right as white persons in the purchase and sale of property, both real and personal where the purchase is made with unrestricted funds. The Government has at no time contended in this case that the lands were restricted while title thereto was owned and held by Frank Ned and this is the first time the Government has asserted that unrestricted lands of the class involved in this case, title to which is cast by descent to full-blood Indian heirs, are restricted in their hands.

2. The decision of the Circuit Court in this case construing the Act of January 27, 1933 (47 Stat. 777) is contrary to a former decision of said Court in the case of *Glenn* vs. *Lewis* (C. C. A. 10, 105 Fed. (2d) 398, 401) wherein the Court, referring to the 1933 Act, said:

> "Furthermore, the first proviso deals with lands acquired by inheritance or devise. Allotted lands acquired through inheritance or devise by full-blood Indians were already restricted by Section 9 of the Act of May 27, 1908 as amended by the Act of April 12, 1926, and to the extent of one hundred sixty acres when a tax exemption certificate had issued therefor, exempt from taxation by the Act of May 10, 1928, *and it was unnecessary to impose restrictions or provide for tax exemption as to full-blood Indian heirs or devisees. This indicates an intention on the part of Congress to deal with an Indian heir or devisee of less than a full-blood.*"

The decision of the Circuit Court in this case construing the 1933 Act as reimposing restrictions upon lands of the class involved herein is contrary to the construction of said Act given by this Court in the case of *Oklahoma Tax Commission* vs. *United States* supra, wherein this Court in reviewing the legislative history of the 1933 Act said:

> "This (Bill) only applies to restricted and tax exempt land."

The decision of the Circuit Court in this case holding that Section 8 of the Act of January 27, 1933 reimposes restrictions upon the class of lands here involved is contrary to the interpretation of the 1933 Act by the Department of Interior. Section 8 of the Act of January 27, 1933 is printed as Appendix "A" and it will be noted from a reading thereof that this Section merely prescribes the procedure essential to a valid conveyance of certain restricted lands of a full-blood Indian heir, such a conveyance is to be valid only if "approved in open Court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June, 1914." Prior to this Act, such a conveyance could be made with the approval of the County Court having jurisdiction of the estate of the deceased. (Act of April 12, 1926, 44 Stat., 239). As to the reason for an enactment of Section 8 see 54 Interior Decisions 382, 385 (1934) where it is said:

> "* * * The purpose of this provision (Section 8) appears to have been to change the function of the County Courts, in approving conveyances, from a ministerial to a judicial act, the recognition thus given to the jurisdiction of those Courts in the matter of approving conveyances by full-blood heirs evidences a plain purpose on the part of Congress not to disturb the existing jurisdiction of such Courts over lands acquired by the full-blood Indians prior to that enactment."

The Act of 1933 clearly does not repeal the Act of May 10, 1928, or the other prior legislation discussed herein. It merely changes the rule as to restricted and tax exempt land inherited by Indians of one-half to full blood. Existing law as to allotted land is not affected at all. The land involved in this case, while the title thereto was vested in Frank Ned, was unrestricted and taxable. Upon the death of Frank Ned it is the petitioner's contention that the land descended to his full-blood heirs free of restrictions and certainly it will not be contended by the Government that the land was tax exempt.

3. The decision of the Circuit Court in this case is contrary to the legislative history of the Act of 1933.[3]

The bill was sponsored by Oklahoma Congressmen and nowhere is there evidence to be found to support the interpretation of the Act given by the Circuit Court that Congress intended to reimpose restrictions upon unrestricted lands of the class involved in this case inherited by full-blood Indians. It was described by its sponsor Congressman Hastings as follows:[4]

> "Now, Section 2, (Section 8 of the 1933 Act) in brief, only permits or requires that notice be given to probate attorneys, and gives them authority, as a matter of right to go into Court to represent these restricted Indians. As the members of the Committee

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[3] Elements of the 1933 Statute were included in H. R. 15603, 71st Congress. The bill was recommitted to the Committee on Indian Affairs for further consideration, 74 Cong. Rec. 3956-3958. The House later amended the provisions of its own bill into S 6169. 74 Cong. Rec. 7219-7222. The bill as amended was not approved by the Senate. The plan was reintroduced in the 72nd Congress as H. R. 8750 and was discussed by the House, the 75 Cong. Rec. 8163-8170 and by the Senate, the 76 Cong. Rec. 2200. This bill was passed by the 72nd Congress and became the Statute under consideration.

[4] Hearings before the sub-committee of the Senate Committee on Indian Affairs on H. R. 8750, 72nd Congress, First Session, May 16, 1932.

know, in the present Interior Department Bill, we appropriate forty thousand dollars for the employment of probate attorneys. * * *

Now, this Section 2, with reference to the conveyance of restricted lands, requires that probate attorneys be given notice to appear in Court to represent these Indians, and they also have a right of appeal to the District Court.

Senator Wheeler: As I recall there was a good deal of these lands that were being transferred by somebody simply presenting the matter to the Court and the Court approving them and without the Indians being heard, that is the probate attorneys being heard in the matter or notified at all.

Mr. Hastings: There was some criticism along that line, Senator; this section would prevent any criticism of that kind, to require that notice be given to them.

Senator Wheeler: Not only did they not give notice, but my recollection was there was testimony to the effect that the judge or judges signed some of these orders on the street or in other places down there without the probate attorney's knowledge.

Mr. Hastings: That criticism has been made in the press.

Senator Wheeler: That is an outrageous procedure, in my judgment, and there is only one way to do it, and this provision is an exceptionally good provision."

Further in the discussion of the bill the statement of John R. T. Reeves, Chief Counsel, Bureau of Indian Affairs, appears as follows:

Mr. Reeves: "We have at this time something between four and five million dollars belonging to that class of Indians, property that was restricted, under the supervision of the Secretary of the Interior, belonging to restricted allottees of the Five Civilized Tribes. Those allottees are now dead; this property belongs to their heirs; if they are less than full bloods, under existing law, there is a grave question that they

are unrestricted, and the department has no power, right, or jurisdiction or supervision. The enactment of this bill will remove any doubt about the situation.

Mr. Scattergood: That applies to section 1, which Mr. Reeves has spoken of. Section 2 speaks for itself, and is a matter of having in open court, instead of outside of court, the approval of these conveyances.

Mr. Reeves: I would like to say in that connection, Mr. Chairman, that under the practice grown up under existing law the courts have held that the approval of those deeds were purely ministerial functions; they did not have to be done in open court, and without notice to the representative of the Government or anybody else; and it is a very easy matter to get a deed from these full-blood heirs, take it around, have the court approve it—the judge would approve it on the street, after hours, or at 9:00 o'clock at night, if he saw fit so to do—without notice to anyone. This bill would require notice to the representatives of the Government and approval of the deed in open court after notice to the parties.

Mr. Scattergood: And with the right of appeal?

Senator Thomas of Oklahoma: Do you know that section 2 changes the procedure relative to the approval of conveyance from a ministerial act to a judicial act?

Mr. Reeves: It does.

Senator Thomas of Oklahoma: And prevents further approval being made in the nighttime or on the public highway or any other place, and requires it be made in open court?

Mr. Reeves: We feel it would be helpful to the Indians in requiring notice to representatives of the Government and approval of these deeds only in open court afterwards as a judicial proceeding.

Mr. Scattergood: And further with the right of appeal?

Mr. Reeves: There is one further idea, Mr. Chairman, that was brought out yesterday; that is, with reference to the effect of this bill on land and the question of taxation. This bill does not impose any restriction on additional land * * *"

Senator Thomas of Oklahoma inquired of Mr. Reeves as follows:

> Senator Thomas of Oklahoma: Then your interpretation of this bill is it provides two things in the main; first, it extends restrictions on monies and lands of Indians of half blood or more and, second, it changes the ministerial act in approving deeds to one of judicial approval.
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> Mr. Reeves: Correct, Senator; except as to the first statement that it extends restrictions on land and money; it extends no restrictions on land. It is only on money. The land is taken care of by the Act of May 10, 1928."

From the statement of Mr. Grady Lewis, Choctaw Tribal Attorney, again it appears clearly that the second section of the bill, which ultimately became Section 8 of the 1933 Act, was intended solely to be procedural and there was no indication that Congress considered the reimposition of restrictions upon the class of lands here involved. A number of other attorneys for the Five Civilized Tribes appeared at the hearings before the subcommittee of the Senate Committee on Indian Affairs and gave statements concerning the bill. These statements all appear in H. R. 8750 of the hearings before the Committee and it appears clearly that the sponsors of the bill had in mind as its main objective the matter of putting in force a definite and uniform procedure with reference to the approval of deeds of full-blood Indian heirs affecting allotted lands restricted by the provisions of the Act of May 10, 1928.

Again we refer to the opinion of the Solicitor of the Department of Interior which was approved by the Assistant Secretary of the Interior construing the Act of January 27, 1933, 54 Interior Decisions, 382 (1934) in which it is said:

> "The rules just stated have no application, of course, to lands purchased by restricted Indians with unrestricted monies."

The above clearly indicates that neither the sponsors of the bill nor the officials of the Interior Department, who were interested in the passage of the bill, considered that the Act was in any wise a reimposition of restrictions on lands purchased with unrestricted funds.

We respectfully suggest that the Circuit Court of Appeals gave undue weight to the letter of the Secretary of the Interior addressed the Honorable Edgar Howard, Chairman of the House Indian Committee, a part of which is quoted in the Court's opinion. We submit that when considering the legislative history of the 1933 Act and the statements of the authors of the bill, as set out above, that the explanation given by the Secretary of the Interior in his letter is not contrary thereto. Instead we urge that the proper interpretation of the Secretary's letter is further evidence of the fact that Section 8 of the 1933 Act has to do solely with the adoption of a procedure governing the approval of deeds executed by full-blood Indians conveying their inherited interest in restricted lands.

If the principle decided by the Circuit Court in this case be adhered to, then we have the anomalous situation in which lands purchased by a full-blood Indian with unrestricted funds are alienable and taxable and wholly unrestricted in his hands and yet such lands pass on his death to his heirs subject to the same restrictions that apply to restricted allotted lands.

Under Rule 10 promulgated by the Supreme Court of Oklahoma, no provision is made for approval of deeds to lands other than allotted lands. A reading of this rule would lead clearly to the conclusion that the Supreme Court could then have only had in mind the individual allotment of the deceased Indian and we submit that when the Congress made Rule No. 10 a part of the procedure in Section 8 of the Act of 1933, Rule No. 10 thereby became as much a part of

the law as if it had been written verbatim into the Act. For the full text of this rule see Appendix "B".

4. We respectfully submit that the Circuit Court has decided an important question of Federal Law which should be settled by this court and we submit that if the rule applied in this case is to be given final approval, any lands acquired by a full-blood Indian of the Five Civilized Tribes, wherever situated, would be restricted in the hands of his full-blood heirs. Many of these Indians have gone to the states of California, Kansas, Texas and other States and they have acquired land in those States which is unrestricted in their hands. Approved rolls could no longer be used as a basis on which to determine who is a restricted Indian and the fact that the restrictions that once existed against the allotment have expired would not aid a title examiner, since under the decision of the Circuit Court any person who purchases lands with his own funds and thereafter dies leaving full-blood Indian heirs is restricted in his right to alienate said land.

If the Act of 1933 is to be interpreted so as to include any lands that may be owned by full-blood Indians, irrespective of the source from which it comes, it would logically follow that a personal disability or restriction is thereby placed upon them. It is our opinion that the Act of 1933 was intended to apply only to lands against which restrictions existed at the time of the passage of the Act.

In this case, since title to the land was acquired with unrestricted funds and on an unrestricted form of deed, the Federal restrictions against alienation have no application. It is our view that the Act of 1933 must be taken as a supplement and read in connection with the former Acts of Congress dealing with restrictions, to-wit:

Act of May 27, 1908, 35 Stat. 312.
Act of April 12, 1926, 44 Stat. 239.
Act of May 10, 1928, 45 Stat. 495.

It cannot be given intelligent application if it is treated as it has been by the Circuit Court of Appeals as independent legislation reaching out to restrict lands acquired at private purchase and with unrestricted funds.

Conclusion.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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